

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALFRED P. CHRISTOFFERSON,
et al.,

Plaintiffs,

v.

WASHINGTON AIR NATIONAL
GUARD, in its capacity as a Federal
Agency, et al.,

Defendants.

No. CV-01-0010-AAM

**ORDER GRANTING
MOTION TO DISMISS,
*INTER ALIA***

BEFORE THE COURT are the *pro se* “Motion Declaring The Federal Contract Null And Void” (Ct. Rec. 68) filed by plaintiff Richard F. Main, and the “Motion To Dismiss” (Ct. Rec. 80) filed by defendants. These motions are heard without oral argument.

I. BACKGROUND

On June 28, 2001, this court entered an order (Ct. Rec. 41) declaring as a matter of law that Timothy Lowenberg, Adjutant General of the Washington Air National Guard, had authority under the Federal Back Pay Act to award federal civilian back pay to the plaintiffs for loss of their civilian technician positions with the Guard. Pursuant to that order, this court subsequently entered another order on March 18, 2002 (Ct. Rec. 54), directing the Adjutant General to correct plaintiffs’

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1 civilian service records and prepare the calculation of federal back pay. The
 2 United States Air Force (USAF) was directed to process the payment thereafter.

3 On August 5, 2002, a “Settlement Agreement & Mutual Release” (Ct. Rec.
 4 65) was filed with the court, signed and dated by Lowenberg; David M. Cohen,
 5 “Authorized Representative of the Attorney General¹; James M. Kinsella, Deputy
 6 Director of the Commercial Litigation Branch Civil Division, Department of
 7 Justice; plaintiffs’ counsel, C. Matthew Andersen, Esq.; and the four individual
 8 plaintiffs (Alfred P. Christofferson, William J. Gibson, John R. Warn, and Richard
 9 F. Main). This agreement was intended to resolve not only the captioned matter,
 10 but also Spokane County Superior Court Cause No. 81-2-03081-0, and State of
 11 Washington Court of Appeals Cause No. 18419-6-III. Among the facts recited in
 12 the agreement (as well as in this court’s June 28, 2001 order) was that in February
 13 2000, the Air Force Board for the Correction of Military Records (AFBCMR) had
 14 determined that plaintiffs had been improperly terminated from their Guard
 15 positions and directed that their military records be corrected to reflect continued
 16 federal military service to age 55.

17 The settlement agreement called for a lump sum payment to the plaintiffs
 18 and the commencement of the appropriate Civil Service Annuity payment and
 19 associated benefits to them as of May 1, 2002. Paragraph 6 at page 5 of the
 20 agreement states:

21 In compliance with the terms of this Settlement Agreement,
 22 the United States will correct the Plaintiffs’ records as follows:
 23 The United States shall modify each of the plaintiffs’ **civilian**

24 ¹ A date does not appear immediately below Cohen’s signature, although a
 25 date does appear immediately below the signature of James M. Kinsella,
 26 reasonably indicating that the document was signed on the same date (August 2,
 2002) by both individuals.

personnel records to reflect a new separation date that reflects constructive service as a National Guard Technician until the age of 55, and a corresponding new retirement date as of that date, **except as to Plaintiff Richard F. Main, whose military and civilian records shall be corrected to reflect constructive service to age 58, with a corresponding retirement date upon reaching age 58.**

(Emphasis Added).

Paragraph 9 of the settlement agreement at page 7 provides that upon execution of the same, the parties will also execute and file a “Joint Stipulation of Dismissal” with prejudice of the captioned action. The agreement indicates the “Joint Stipulation of Dismissal” was “attached to this Settlement Agreement” when it in fact, was not. Plaintiffs “expressly consent[ed] to the filing of the Joint Stipulations and to the dismissal of these actions with prejudice.” Paragraph 10 of the agreement at page 8 provides that “[a]ll pending matters between the parties will be dismissed upon satisfaction of the terms of this Agreement.”² An order of dismissal has never been filed in the captioned action.

Paragraph 13 of the agreement provides that defendants are to promptly take the steps outlined in the agreement and “[s]hould any Defendant fail to act in accordance with the terms of this Agreement, a Plaintiff may declare this Agreement null and void as to him.” Mr. Main, in his March 14, 2007 filing, has

² Footnote 2 at page 7 of the settlement agreement provides that plaintiffs and a state representative would execute a stipulation of dismissal with regard to the Spokane County Superior Court and Washington Court of Appeals causes. Such a stipulation, however, was not executed. On March 30, 2007, the Spokane County Superior Court issued an order dismissing with prejudice Cause No. 81-02-03081-0 pursuant to a motion filed by Chistofferson, Gibson, and Warn. Mr. Main objected to dismissal and was allowed an opportunity to be heard before this order was entered. The court found that all terms and conditions of the settlement had been fulfilled. (Ex. 2 to Declaration of Susan E. Thomsen, Attachment D to Ct. Rec. 79).

1 declared the agreement null and void as to him.³ In response, the defendants
2 contend that they have complied with all of the terms of the agreement and ask
3 that the captioned action be finally and formally dismissed with prejudice per the
4 terms of the agreement.

5 6 **II. DISCUSSION**

7 Mr. Main apparently does not dispute that he has received his portion of the
8 lump sum payment called for by the settlement agreement, as well as the Civil
9 Service Annuity payments called for by the agreement.⁴ He claims, however, that
10 this expenditure of U.S. Air Force and Civil Service funds is not valid because the
11 AFBCMR has not corrected his "USAF RESERVE retirement[,] Washington Air
12 National Guard retirement[,] and Federal civil service Retirement from 30 Nov 84
13 to 30 Nov 87."⁵ (Ct. Rec. 68 at p. 2). Mr. Main acknowledges that Washington
14 Air National Guard has corrected his records from November 30, 1984 to

15 _____
16 ³ Matthew C. Andersen, Esq., was counsel for the four individual plaintiffs
17 (Main, Alfred P. Christofferson, William J. Gibson, John R. Warn, Esq.) at the
18 time the "Settlement Agreement & Mutual Release" was executed. Christofferson,
19 Gibson and Warn represent the terms of the June 2002 "Settlement Agreement &
20 Mutual Release" have been fully satisfied as to themselves. Mr. Andersen has
21 withdrawn as counsel for Mr. Main.

22 ⁴ Mr. Main's former counsel, Mr. Andersen, in a letter to Main dated
23 November 15, 2006, indicated that Main had been paid in full and was regularly
24 receiving the corrected civilian and military pay. (Ct. Rec. 69-2 at p. 134).

25 ⁵ Mr. Main, born November 30, 1929, turned 55 years old on November 30,
26 1984 and 58 on November 30, 1987. As noted, the settlement agreement called
27 for his military and civilian records to be corrected to reflect constructive service
28 to age 58, with a corresponding retirement date upon reaching age 58.

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1 November 30, 1987⁶, but contends this is invalid without “Federal Recognition
2 from the USAF.” (Ct. Rec. 84 at p. 2). Without proper validation, Mr. Main
3 asserts he will be “subject to audit and refunding some amount of Federal funds.”
4 (Ct. Rec. 84 at p. 3). Mr. Main contends the settlement agreement has been
5 breached by the refusal of Adjutant General Lowenberg to request AFBCMR to
6 correct Main’s “federal recognition” date. (Ct. Rec. 84 at p. 5).

7 Paragraph 6 of the “Settlement Agreement & Mutual Release” does not
8 specify it is the AFBCMR that is to correct the records. Instead, it refers to the
9 more generic “United States” being responsible for that effort. In addition to the
10 four individual plaintiffs, “The United States of America, acting through the
11 Department of the Air Force” was listed as a party to the agreement (Ct. Rec. 65
12 at p. 2) and two individuals, Cohen and Kinsella, as representatives of the U.S.
13 Attorney General, signed the agreement on behalf of the United States as they
14 were authorized to do. The defendants named in the captioned action included the
15 Washington Air National Guard, Lowenberg, the United States Air Force, and the
16 National Guard Bureau. As this court pointed out in its June 28, 2001 order, the
17 Washington Air National Guard and Lowenberg were sued in their “federal
18 capacities.” (Ct. Rec. 41 at p. 2 and fn. 1). The National Guard is an organization
19 possessing both federal and state attributes. This court ultimately found that an
20 adjutant general is both a federal agent and a state official with regard to National
21 Guard technicians and that in his federal agent capacity, he has the authority to
22 award federal back pay to civilian technicians. (Ct. Rec. 41 at p. 39). “The
23 adjutant general is an ‘official’ of the Department of Defense because pursuant to
24

25 ⁶ See exhibits attached to Declaration of LTC. Darin T. Derrick, Attachment
26 B to Ct. Rec. 79.

1 [32 U.S.C.]§709(d) the Secretary of Air Force provides him with authority to
2 employ and administer the technicians.” (Ct. Rec. 41 at p. 40). In sum, the
3 “United States,” through its agent, Lowenberg, corrected the military and civilian
4 records of Mr. Main. This is “federal recognition” which complies with Paragraph
5 6 of the “Settlement Agreement & Mutual Release.” Again, there is no mention in
6 the agreement of the AFBCMR needing to correct the records and indeed, if such a
7 need arises from some authority other than the agreement, it appears Mr. Main has
8 a very persuasive argument for waiver on the part of the United States should it
9 ever seek to compel him to refund monies which have already properly been paid
10 to him pursuant to the agreement.⁷

11 _____
12 ⁷ Mr. Main contends the Secretary of the Air Force has the authority to
13 correct his records and promote him “to 0-6 as a compensatory action for my
14 diligence, dedication to my oath of office and the years of sacrifices my household
15 has endured to uphold the rule of law.” If Mr. Main is asking for a “retroactive”
16 promotion, this is specifically prohibited by the “Settlement Agreement & Mutual
17 Release” which provides:

18 The Plaintiffs acknowledge and agree that, regardless of the
19 modifications made to their military and civilian personnel
20 record and, notwithstanding any actions taken by the United
21 States or the named Defendants in connection with this
22 agreement, Plaintiffs shall not receive any retroactive
23 promotion consideration by any selection boards or admini-
24 strative bodies.

25 (Paragraph 10 at pp. 7-8).

26 If Mr. Main currently remains in the U.S. Air Force Active Reserves and is
27 eligible for future promotions, it is not apparent how this “Settlement Agreement
28 & Mutual Release” would preclude that considering, as discussed, there has been
“federal recognition” of the need to correct Main’s records and the records have
been so corrected.

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1 The balance of Mr. Main's arguments as to the validity of the "Settlement
2 Agreement & Mutual Release" amount to form over substance. It is true that a
3 "Joint Stipulation of Dismissal" was to be executed and filed as an attachment to
4 the "Settlement Agreement & Mutual Release." This did not occur, but the court
5 fails to see why it would render the agreement invalid and more importantly, how
6 it prejudiced Mr. Main. " Furthermore, it is noted that the agreement also
7 provided that "[a]ll pending matters between the parties will be dismissed upon
8 satisfaction of the terms of this Agreement." If anything, Mr. Main and the other
9 plaintiffs benefitted from there not being a dismissal of the captioned action until
10 now to insure the United States complied with all of the terms of the agreement.
11

12 **III. CONCLUSION**

13 Plaintiff's "Motion Declaring The Federal Contract Null And Void" (Ct.
14 Rec. 68) is **DENIED** and defendants' "Motion To Dismiss" (Ct. Rec. 80) is
15 **GRANTED**. It appearing that all terms and conditions of the "Settlement
16 Agreement & Mutual Release" have been satisfied, the captioned action is
17 **DISMISSED with prejudice**. The parties shall bear their own fees and costs.

18 **IT IS SO ORDERED.** The District Executive shall enter this order and
19 forward copies to counsel and to Richard F. Main, W. 26203 Prewett Road,
20 Reardan, WA 99029-0634.

21 **DATED** this 9th of May, 2007.

22
23 s/ Alan A. McDonald
24 **ALAN A. McDONALD**
25 Senior United States District Judge
26

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